87-1913

NO.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

Connie Reshard,
Petitioner,

V.

Jim Burnely, Secretary
U.S. Department of Transportation,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Connie Reshard, Esq.
700 Seventh Street,SW
No. 725
Washington, D.C.
20024
202-488-3832

Petitioner Pro Se

QUESTIONS PRESENTED

I. Is the availability of interim injunctive relief or declaratory judgment during the pendency of litigation absolutely barred under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e, et seq., against racial harassment, discrimination and retaliation with loss of tangible job benefits, e.g., suspensions without pay, discharge, verbal abuse, where the employer knows and sanctions such acts by a supervisor.

II. Is it reversible error that the District Court made clearly erroneous findings of material facts regarding the nature of derogatory statements with racial overtones, racial harassment, and retaliation, which clearly are not supported by the record.

III. The Court of Appeals clearly erred by granting summary affirmance to the Respondent.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES CONTINUED PAGE

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

NO.

CONNIE RESHARD,

Petitioner,

V.

JIM BURNLEY, SECRETARY
U.S. DEPARTMENT OF TRANSPORTATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Connie Reshard, petitions for a Writ of Certiorari to the United States

Court of Appeals for the District of Columbia Circuit to review the order filed April 6, 1988, in Reshard v. Burnley, D.C.Cir. No. 88 - 5035.

OPINIONS BELOW

The order of the District Court filed January 29, 1988, in C.A. No. 87-2794 (Penn, J.), denying petitioner's Motion for Stay, Temporary Restraining Order, Preliminary Injunction, and Declaratory Relief in favor of Defendant and Respondent, is unreported and reproduced in the Appendix filed herein ("APP."), at 7-15.

The Order of the Court of Appeals filed April 6, 1988, in No. 88 - 5035 (Robinson, S., Silberman, L., and Williams, S.), granting Respondent's Motion for Summary Affirmance is unreported and reproduced at App. 1-4.

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1254(1).

The order sought to be reviewed was entered on April 6, 1988.

STATUTES INVOLVED

Pertinent portions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e, et seq. (1982) are reproduced at App. 19-23. Section 7513, 5 U.S.C. is quoted in the text. [section 1613.203 of 29 C.F.R. Ch.XIV (1987) and paragraph 8(a)(3) of DOT Procedures for Processing Complaints of Discrimination in Employment Practices, DOT Order 1000.8A, (7-10-76) are reproduced in the App. at 24-25]

STATEMENT OF CASE

Petitioner Connie Reshard ("Reshard"), a black female, was hired by the U.S. Department of Transportation, Office of the Secretary Office of the Assistant Secretary for Policy and International Affairs (air transportation), on September 6, 1977 as an Economist, G.S.

0110 - 11. Reshard has an advanced degree in Economics.

In August 1981, after Reshard began law school in the evening program at Georgetown University Law Center, her first and second level supervisor, Edward Oppler, undertook certain harassment tactics against Reshard because he believed that law school was too ambitious an undertaking for a Black person. He would check-up on her when she was on leave, questioned her ability to do her job, be a single parent and attend law school.

While on leave with her sick son on March 15, 1982, Mr. Oppler and, at his instruction, a colleague telephoned Reshard at home to give her one last chance to come in and attend an impromptu meeting which was being covered by Edward Robinson. When Reshard raised the issue with Oppler, he withdrew a pending promotion to the G.M. 14 on March 16, 1982. It had just been

resubmitted to the Office of Personnel after an administrative delay (11/81 - 3/82) on or about March 1, 1982. His reasons for this act was that my job performances had deteriorated because of law school. My race was the reason.

Another factor played a role. Reshard had raised concerns about her work assignments being given to or taken credit for them, by Rosalind Ellingsworth, a white consultant with only a high school diploma. (G.S. 14) She was being trained to become a G.M. - 15 supervisor in our unit.

Regarding the promotion, I complained to Mr. Oppler's superior and to senior officials, but sitll the promotion was delayed until November 1982. As a result of the promotion issue, the job situation worsen and never recovered. A Black person could not raise such issues. My white peers did, and they were accommodated with joint foreign travel along with Ellingsworth; Joint arrange-

ments for promotion to G.M. - 15 for Edward Robinson and Ellingsworth. She was made permanent in May 1984 at G.M. - 15, and became my official supervisor. Robinson's promotion soon followed.

Although part of the job function was the negotiation of transportation treaties, all my white peers conducted negotiations in foreign countries, but I was not allowed to travel. Some choice assignments were directed from me to others, and my participation was carefully conrolled. Mr. Oppler created an appearance that this discriminatory treatment was due to my poor job performance, in one way, by co-authoring nearly all of my work regardless of the degree of his contribution. Later, I would learn that Ellingsworth and Oppler actually told senior officials that I could not do my job although there was no legitimate basis for their statements. These actions were based on racial discrimination and harassment. Ellings-

worth attempted to have me transferred to another unit in 1984.

Between late 1984 and March 1985, virtually all of the major countries assigned to me were given to a white male, G.M. - 13, Edward Wilbur, despite the fact that I had done an exceptional job, especially with Japan. I considered a reassignment and was forced to seek one because of an escalation in harassment from my supervisors, on April 14, 1985.

The reassignment was temporary in order to determine whether we liked each other. Immediately, Director Joe Canny told me I could "camp out" in the storage room for an office. I was not wanted because my former supervisors black listed me.

In June 1985, I applied for a G.M. - 15 supervisory position under Oppler and Ellingsworth, but I was not selected and told that I did not rank high enough to be referred for consideration. The candidate

selected had no prior experience in treaty negotiations and less formal education. I had just graduated from law school in May 1985. I had good job evaluations, above the minimum fully meets requirements, and I had broad overview of economic regulation of interstate transportation as well.

In August 1985, Ellingsworth and Oppler would use the performance based merit system to effectuate racial discrimination. I would receive a substantially lower rating and certain due process violations occurred. My temporary job was deliberately excluded in the rating that covered August 1984 - July 31, 1985. Salary increases are based on these ratings and promotions or lateral transfer require a current valid appraisal for consideration for a job in the merit system for managers in G.M. 13 - G.M. - 14. Despite my protestations through oral and written memoranda to my supervisors, Office of Personnel, and even to Assistant

Secretary Matthew Scocozza, no relief was granted and the appraisal was placed in my personnel folder.

Because I was not wanted in Joe Canny's office, I sought to return to my permanent job; I was not allowed to do so. Instead, I had to interview throughout the Office of the Assistant Secretary fo Policy and International Affairs, just as if I were a new hire. No unit would take me. As a result, I was assigned to the immediate staff of the Assistant Secretary Scocozza in January 1986, a more prestigious assignment on the special projects staff. This was resented by many staff, including Cindy Burbank who was my peer on the staff and new supervisor. For example, Canny's office requested my signature approval before Canny rather than the reverse which was customary for the higher level office. I became Burbank's assistant and was given no major assignment until May 1986, a position on

Secretary's Dole's task force on the national air space plan by Scocozza. Deputy Assistant Secretary for Budget Raymond Karam was the chair of the group and would not take me. My professional reputation had been impugned because of my race.

Burbank wanted me transferred because she did not consider a Black superior enough for the position. My job evaluation criteria and assessment for 1986 (August 1985 - July 31, 1986) would be conducted in secret by Burbank and Canny, then handed to me when it was due in the personnel office in September 1986. I refused to sign it and personnel Chief, Vicki Novak, would extend the review period to December 31, 1986. During this period, Patrick Murphy, the new director and my new supervisor beginning in August 1986 would not give me any work to do during this period. In November, he advised that I would be transferred to the Transportation and Trade unit. He too did not want a black on his staff. Again I complained to Scocozza,

Director of Personnel Diana Ziedel and Secretary Dole. Meanwhile, I had been physically moved out by Murphy. I complied and continued the protest. I complied with Bruce Butterworth who was to be my new supervisor, when he requested that I complete new performance standards on December 8, or forfeit prior approved leave for the following day to appear in court, not knowing that he was withholding a memo for me from personnel authorizing my transfer to his division on December 14 and giving me ninety days from that time to be evaluated retroactively for the August 1985 - July 31, 1986 period. When I continued to object, I was threatened with discipline and later given a letter of warning on December 18, 1986, covering failure to meet and communicate between December 11 and 12. I was not yet officially on his staff. I renewed contact with an equal employment counselor on December 18, 1986. I had consulted counselors in 1984

and 1985.

The employment relationship steadily deteriorated. It was extremely stressful and humiliating. I was asked to do legal analysis and, in return, I asked for a small stipend to my salary in recognition of the J.D. and enlargement of my job functions. I was told that I was compelled to do the work and I could leave. I was given assignment by a peer and I was given itemized numeric calculations as if I were a G.S. - 9. My name was listed on division rosters at the bottom after the lowest level employee. Work submitted for typing was not returned for review, but issued with errors or my name would not be reflected as the author. I sustained verbal abuse from Butterworth. I was given the same assignment as a peer, creating my embarassment when I contacted industry persons or other agencies. Butterworth gave assignments deliberately with impossible deadlines so I would have to

ask for an extension. In order to make out a case of excessive leave use, he deliberately falsified my leave use on two occasions in December 1986 and January 1987. He refused to change one of them, despite the fact that he did not report to work on the day in question, and did not correct it until June. This account demonstrates the collective nature of harassment directed to me because of my race and in retaliation.

Specifically, about the end of January 1987, while attending a staff meeting, Butterworth compared my ability to perform an assignment on competitiveness in trade, by stating that may be I could do the job because may be I was as good as Dennis Marvich, a white economist, G.M. - 13. I was embarassed and humiliated in front of the staff. A request for an apology in private was ignored. In protest, I did not attend staff meetings which were more social events than the actual conducting of work.

A few days after my exit interview with the equal employment counselor ended informal settlement of my complaints, I received a second letter of warning on March 10, 1987, for failure to attend staff meetings and to perform legal work. I had actually completed one legal task and asked to discuss the inclusion of legal work. The outcome was take it or leave.

On March 18, 1987, I filed a complaint with DOT, setting forth these facts contained here. After the complaint was accepted in April, I would be threaten with discharge if I did not accept DOT's proposed resolution on the job evaluations, by an Office of Civil Rights staff.

In June 1987, the Office of Personnel withdrew the retroactive job evaluation but insisted that I accept a six month review for 1987. Past efforts to agree by stipulation between the parties was not accepted by DOT. On June 16, 1987, I received a letter of reprimand incorporating the two letters

of warning. The staff meeting issue and failure to perform an assignment in which I had actually completed were cited. On June 25, 1987, I responded to the letter of reprimand, again explaining the staff meeting incident. I attached a copy of the discrimination complaint. On or about July 20, I attempted to discuss the issues in the reprimand with Director Arnold Levine. He declined, stating that he had not seen it. I gave him a copy.

On July 20, 1987, I met with Assistant Secretary Scocozza to seek permission to apply for a G.M. - 15 trade policy analyst position, which had been designed for Florie Liser, a black recruited by Butterworth in February 1987. A job evaluation no more than one year old is a standard requirement for vacancy in the merit system. I have not had one since 1984. I raised the issues in the letter of reprimand and the harassing work environment. Scocozza agreed that the staff meeting incident constituted miscon-

duct by Butterworth and promised to correct the various problems. I was allowed to apply for the trade position and used the 1984 file.

Only Liser and I applied. I was never seriously considered even though I am the more qualified candidate. I was not even notified of the selection on August 3, 1987, but inquired on August 17. No explanation was given despite my superior legal and economic expertise. I had been discriminated against in retaliation for filing a complaint. I amended my complaint on August 17 and asked Secretary Dole to intervene. She referred me to the discrimination process on August 25, 1987. I was emotionally devastated and took about 11 days of sick leave in early September. I was physically ill and humiliated. Butterworth asked for a doctor's slip, that I provided to Levine who told me I would be sorry I had not cooperated with their arrangements since December 1986. When I took sick leave during the last

week of September, I was placed on restrictive leave policy even though I had not taken vacation leave, without notice of a change in the general policy. On September 30, Levine was supposed to give me notice but did not because I left the office when the day ended at 5:35. I had no knowledge of the new policy when I left with a stress headache. I was placed on absence without leave for the next two days. On October 5, I asked Levine to meet with Butterworth and Scocozza in order to call an end to the state of affairs. I was suspended on October 6, 1987 for failure to attend staff meetings. I requested leave for October 7, in order to prepare a response and was again placed on absence without leave.

In response to the rapidly deteriorating situation, I filed this civil action in United States District Court on October 15, 1987; racial discrimination, harassment and retaliation under 42 U.S.C. 2000e-16,

et seq. On October 19, 1987, I moved for interim injunctive relief to enjoin DOT from continuing systematic and deliberate harassment from December 1986 forward.

Immediately on October 21, DOT proposed to suspend me for 14 days. All of the alleged infractions had occured by October 7, except the staff meeting issue. Butterworth claimed rude and disrespectful behavior toward him and Levine; failure to accept official correspondence, violation of restrictive leave policy mentioned above (5 days without pay), locked myself in the office (told Butterworth I was not in building, invertently locked door), among other things. The district court denied the Temporary Restraining Order on October 21, sua sponte.

On October 23, I responded to the proposed 14 day suspension by supplementing submissions to the Motion for Preliminary Injunction.
I notified Butterworth and Levine. I denied or explained the allegations. It was not rude

or disrespectful to return papers including the invalid performance appraisal. In fact the October 19 filing included explanations for each of the incidents. The stress was increasingly difficult.

On November 30, the District Court held a hearing on the Preliminary Injunction but took no action nor did it make any supervisory comments, despite the fact DOT suspended me for the 14 days in November.

On December 2, 1987, DOT proposed to remove me from the competitive service for not attending staff meetings, claiming insubordination. I filed comments on December 18 through Assistant U.S. Attorney William Dempster, repeating the staff meeting issue and included another incident where Butterworth gave me a complicated assignment, directing me to get instructions on how to do it from a peer. I asked Dempster to transmit the decision and notified Levine of the same. I never received the notice before it was

to become effective on January 4, 1988 from Levine, the third level supervisor. [Dr. Voyce Mack, Deputy Director and second level supervisor did not sign any of the disciplinary actions. He is Black.]

I asserted that I had not been removed.. DOT secured my office on January 5, and confiscated my belongings. I was threaten with arrest for trespass if I attempted to enter the facility on January 6. My long discriminatory treatment and hostile work environment had been imposed to force me to leave. When I did not comply, I was fired.

The District Court still had not acted on the preliminary injunction even though adverse actions continued. The emotional distress worsen. A status hearing on January 11, only resulted in a request for DOT to explain its allegded removal, even though it was the same issue that DOT had not denied or explained. I supplemented my Motion for Preliminary Injunction, renewed a Temporary

Restraining Order, Moved for a stay and sought declaratory judgment on these issues. In its January 22, submission, DOT denied the staff meeting account, stating that I was asked to confer with Dennis Marvich. App. at 8-9. A hearing was held that day and on January 29, 1988, the District Court denied all Motions. App. 7.

Petitioner filed an appeal on February 3, 1988, and moved for a mandatory stay of the dismissal on February 8. The Court of Appeals denied the stay on March 7, 1988. Respondent's motion for summary affirmance was granted on April 6, 1988, to which the petition for review by writ of certiorari is made.

REASONS FOR GRANTING WRIT OF CERTIORARI

Whether interim injunction or declaratory judgment is available under Title VII has lead a controversial history. The Circuits have taken differing views and the issue

should be settled and explained by this Court, especially since some courts are treating Sampson v. Murray as a complete bar to the grant of preliminary injunction during the pendency of the litigation on the merits. 94 S.Ct. 937 (1974), discussion infra. Petitioner's case presents a hostile work environment saturated with retaliation. Here the issues include employee discharge and other tangible adverse actionas as well as intangible harassment which were known and apparently sanctioned by senior officials.

Serious abuse of discretion and application of improper principles of law governing the hostile work environment and retaliation were made, in part, because the findings of material fact are not supported by the record and are clearly erroneous, constituting reversible error.

I. TITLE VII PROTECTS AGAINST EMPLOYER HARASSMENT AND RETALIATION WHICH CAN BE ENJOINED ON AN INTERIM AND PERMANENT BASIS THROUGH APPROPRIATE EQUITABLE RELIEF.

Title VII of the Civil Rights Act of 1964 prohibits discrimination against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. 42 U.S.C. 2000e-2(a)(1) (1982). These provisions were extended to Federal workers under section 2000e-16. Courts have long recognized that an offensive work environment because of race can completely destroy the emotional and psychological stability of the target employee or group. Roger v. EEOC, 454 F.2d 234 (5th Cir. 1971); Firefighters Institute for Racial Equality v. City of St. Louis, 549 F.2d 506, 514-515 (8th Cir. 1977).

This Court has recognized the hostile work environment violates Title VII, noting

that Congress manifest an intent to include the noneconomic psychological effects of unlawful discrimination.[1/] Meritor Savings Bank, FSB v. Vinson, 106 S.Ct. 2399, 2404 (1986); Los Angeles Department of Water and Power v. Manhart, 435 U.S. 702, 707, n. 13, 98 S.Ct. 1370, 1375, n.13, 55 L.Ed.2d 657 (1978). In Meritor, this Court recognized that the Equal Employment Opportunity Commission ("EEOC") administrative guidelines [on sex discrimination] fully support the view that harassment leading to noneconomic injury can violate Title VII. Meritor cited EEOC conclusion, "that Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult." Id. at 2405.

Surely a hostile work environment directed

[1/] For Federal employees, Title VII is the exclusive remedy and monetary damages for emotional distress are not permitted. [This strongly suggest that interim relief should be available to these workers.] See Brown v. General Services Administration, 425 U.S. 820 at 826 (1976).

at Reshard because of her race and in retaliation is actionable under Title VII. The seriousness of continuous violations during the pendency of litigation before her discharge should have been enjoined or declared invalid by the District Court.

A. Congress Intended that Interim Injunctive Relief Would Be Available to Employees In Order To Preserve the Integrity of Title VII. [2/]

Under section 2000e-5(g), 42 U.S.C., "if the Court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful practice charged in the complaint, the court may enjoin . . .," such conduct by injunction, appropriate affirmative action; equitable relief, back

---

2/ The declaratory judgment is not specifically mentioned but the arguments made are generally applicable. No showing of irreparable harm is required to grant such relief on the discharge and other issues. See Denton v. Secretary of the Air Force, 483 F.2d 21 (9th Cir. 1973), cert. denied, 414 U.S. 1146, 94 S.Ct. 900, 39 L.Ed.2d 102 (1974).

pay, and reinstatement. This Court has long recognized the equitable nature of this remedy and the District Court must fashion a remedy which will make the employee whole. Albermarle Paper Co. v. Moody, 422 U.S. 405, 421, 95 S.Ct. 2362, 2373, 45 L.Ed.2d 280 (1975). The psychological effects of a hostile work environment can only be remedied through interim injunctive relief in order to prevent permanent scars. Otherwise potential litigants and witnesses in plaintiff's case would be afraid to testify truthfully in fear of retaliation against them. The integrity of eliminating unlawful discrimination under Title VII is compromised by the denial of interim injunctive relief was not recognized by the Court of Appeals in this case.

In the Title VII context, courts have applied the traditional requirements for injunctive relief - likelihood of success on the merits, showing of irreparable harm, adverse impact against others, and a showing

that the relief is in the public interest. Garcia v. Lawn, 805 F.2d 609 (9th Cir. 1986); See Metropolitan Area Transit Comm'n. v. Holiday Tours, Inc., 559 F.2d 841, 843 (1977).

While the District Court has discretion in deciding whether to grant interim injunctive relief, National Assoc. of Greeting Cards Publishers v. U.S. Postal Service, 662 F.2d 767 (D.C. Cir. 1976), this discretion must be guided by the overriding ameliorative goals of Title VII, to discourage employers from discriminating and to compensate discrimination victims as fully as possible. 95 S.Ct. at 2371.

B. Courts Are Divided On The Availability Of The Interim Injunctive Device In Title VII Cases.

Where retaliation is present, some courts have not hesitated in granting interim injunctive relief. Garcia v. Lawn, 805 F.2d 1400; Middleton-Keirn v. Stone, 655 F.2d 609, 612 (5th Cir. 1981); Gibson v.

U.S. Immigration and Naturalization Service, 541 F.Supp 1311 (S.D.N.Y. 1982); Manhart v. City of Los Angeles Department of Water and Power, 387 F.Supp 980 (D.C.CA. 1975).

These courts have found that a retaliatory discharge or other adverse personnel action carries a distinct rick that other employees may be deterred from protecting their rights under Title VII or in providing testimony for the Plaintiff. Such risk are not speculative and have been found to constitute irreparable harm against both private sector and government sector defendants. In Garcia, the Ninth Circuit stated, "retaliatory conduct would have [adverse affect] on the exercise of Title VII rights by other government employees, a factor which courts and commentators have deemed important in considering the appropriateness of injunctive relief under Title VII. citing, Holt v. Continental Group, Inc., 708 F.2d 87, 91 (2d Cir. 1983), cert. denied, 465 U.S. 1038, 104 S.Ct. 1316,

79 L.Ed.2d 712 (1984)(private sector case, failure to exhaust state remedies)[3]; Hyland v. Kenner Products Co., 10 F.E.P. 367, 378 (S.D. OH. 1974); B. Schlei & P. Grossman, Employment Discrimination Law 1063 (2d. ed. 1983). 805 F.2d 1400, 1405. That court noted, "The harm is a continuing one so long as the retaliation remains in effect Id at 1505-6. emphasis added. Every day Petitioner's remains unemployed, the more severe the chilling effect will be on witnesses and potential litigants.

While the Second circuit has not directly ruled on the issue, it has recognized that retaliation can meet the requirements of irreparable harm. 708 F.2d 87, 91.

The Ninth Circuit has granted interim injunctive relief in the private sector without a showing of irreparable harm.

---

[3] Petitioner exhausted administrative remedies under 42 U.S.C. 2000e-16(c), because the agency had not made a final decision after the expiration of 180 days after the complaint.

EEOC v. Pacific Pres Publishers, 535 F.2d 1182 (9th Cir. 1976). Other Circuits have been reluctant to grant such relief in either the private or public sector case. See EEOC v. Anchor Hocking Corp., 66 F.2d 1037 (6th Cir. 1981); Porter v. Adams, 639 F.2d 273 (5th Cir. 1981)(decided after Middleton-Keirn v. Stone)

The Seventh Circuit rejected a non-retaliatory claim in an age discrimination claim because the involuntary retirement conferred retirement benefits, which, in its view, removed the loss of morale or skill factor (noneconomic loss). EEOC v. City of Janesville, 630 F.2d 1254, 1259 (7th Cir. 1980). Quite the contrary, Reshard has no source of income and because of DOT's illegal conduct regarding her job evaluations, she cannot meet that part of the criteria for similar jobs in the Federal service.

Some courts have distinguished those

plaintiffs who have had prior successfully adjudicated discrimination claims, granted interim injunctive relief for subsequent retaliation claims. 805 F.2d 1400; 541 F.Supp 1311. This comparison should be irrelevant because the underlying Title VII claim is unimportant in a retaliation case. Parker v. Baltimore & O. R. Co., 652 F.2d 1012, 1018-19 (D.C. Cir. 1981); Womack v. Munson, 619 F.2d 1292, 1297 (8th Cir. 1980).

The reason for the complexiity and varying views on the availability of interim injunctive relief is Sampson v. Murray, 415 U.S. 61. That Court held that courts should not ordinarily interfere with internal government processes in an employment discharge case during the pendency of administrative process. The case involved the discharge of a temporary employee who had few vested rights to Federal employment, unlike Reshard who has ten years of service. That plaintiff

objected to procedures applied in her dismissal. Still, some courts have applied Sampson as if it were a per se rule against interim injunctive relief in employee discharge cases. EEOC v. Anchor Hocking Corp., 666 F.2d 1037. Other courts have taken the better view. Garcia states, "In Title VII Congress has clearly lessened the latitude traditionally granted the government in conducting its internal affairs. 805 F.2d at 1405; See also, Gibson v. U.S. Immigration and Naturalization Service, 541 F.Supp 1311. A per se rule under Sampson would preclude all interim injunctive relief and that is not what Congress intended under section 2000e-5. The legislative history is supportive.

> "The Federal Service is an area where equal employment opportunity is of paramount significance. Americans rely upon the maxim, "government of the people," and traditionally measure the quality of their democracy by the opportunity they have to participate in governmental processes. It is therefore imperative that equal opportunity be the touch-

stone of the Federal System." H.R. Rep. No. 238, 92d Cong., 2d Sess. 2 reprinted in 1972 U.S. Code Cong. & Ad. News, at 2157.

Under the present state of the law in the Circuits, this Court should grant the Writ of Certiorari in order to settle the law and give perscriptive guidance to lower courts.

II. GRANTING SUMMARY AFFIRMANCE WAS ABUSE OF DISCRETION.

The Court of Appeals summarily affirmed the District Court's decision which is permitted only if it is clear that further proceedings will materially benefit the review. Walker v. Washington, 627 F.2d 541, 545 (D.C.Cir. (per curiam), cert. denied, 449 U.S. 994 (1980). Here the District Court made erroneous findings of fact which are not supported by the record, and applied the wrong law and abused its discretion. The court's action yields an unjust result - justice delayed is justice denied.

A. Erroneous Findings of Fact.

The District Court states that Mr. Butterworth asked Ms. Reshard to confer with Mr. Marvich. App. at 8. That statement was made by Mr. Butterworth and Mr. Marvich which is contained in their Affidavits first made on January 22, 1988 on the basis of their knowledge and belief. The record reflects this account. With respect to the discharge, Petitioner had a legitimate reason for not attending staff meetings. The facts reflect the same for other findings made by the District Court. Further, Reshard repeatedly responded to DOT on all of the allegations of misconduct; the implementation of the adverse personnel actions underscore the conclusion that DOT did not consider her comments. These facts contrast dramatically with the facts in Walker v. Washington, that plaintiff refused to submit records which were required to be conducted as a part of his job. He had no legitimate reason

to refuse to complete them. Id. at 545.

The District Court ruled that constructive notice of the decision to discharge had been made. App. at 11. Petitioner did not have actual notice before January 5, 1988. Both DOT and Assistant U.S. Attorney Dempster could have delivered the notice through Dempster. Comments were submitted through Dempster and he discussed such arrangement with Reshard.

The District Court made no findings of fact regarding the hostile environment with respect to the various examples provided by Reshard. Retaliation was not mentioned. App. at 7-15.

These examples of clearly erroneous findings of fact are prejudicial and the decision should be reversed.

B. Improper Law Was Appled.

It has been held that to engage in protective activity under section 2000e-3, 42 U.S.C., bars the discnarge, suspensions,

harassment, and retaliation. Payne v. McLemore's Wholesale &Retail Stores, 654 F.2d 1130 (5th Cir. 1981), rehearing denied, 660 F.2d 497, cert. denied, 455 U.S. 1000, 102 S.Ct. 1630, 71 L.Ed.2d 866 (1982). Reshard engaged in protective protestations in the matter of the adverse personnel actions. Yet, the District Court found that Petitioner would be a disruption to the DOT. App. at 13. It was DOT whose conduct over the years has been designed to constructively force Reshard to resign. She did not, and the DOT illegally discharged her. It was DOT which attempted to force Reshard to accept another invalid job evaluation for 1987, prepared over six months rather than 12. It has been placed in her personnel file. DOT was aware of the state of affairs at the highest level within the agency and apparently sanctioned this conduct, by not taking action to resolve.

Even in the absence of racial harassment

and retaliation, the discharge was inconsistent with 5 U.S.C. 7513(a). It states that the decision to remove or suspend an employee for 14 days or more can only be done, "for such cause as will promote the efficiency of the service." The staff meetings did not affect Reshard's work or that of other employees. Her assignments from Butterworth were submitted in writing on most occasions. The decision to remove was not timely, and it was arbitrary and capricious. In fact DOT states that Reshard disobeyed a direct order of her supervisor. Who was harmed?

Here, petitioner engaged in protective activity and suffered adverse actions and treatment, and a causal connection existed between petitioner's protestations and the adverse actions. See Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 254 n.7, 101 S.Ct. 1089, 1094 n.7, 67 L.Ed.2d 207 (1981). The manifestation of racial harassment and discrimination can be inferred

from these facts pursuant to sections 2000e-3, 5, and 16, 42 U.S.C.[4/] Id; App. at 19-23.

While employment discrimination cases are viewed under a clearly erroneous standard, if findings of fact are based on mistaken impression, the Court of Appeals was not bound by clearly erroneous standard. De Medina v. Reinhardt, 686 F.2d 997, 222 U.S.App.D.C. 371, 375 (D.C.Cir. 1982).

C. Court Abused Its Discretion.

In this case, the Court of Appeals and the District Court state that they relied on the principles for granting interim injunctive relief set forth in Washington Metropolitan Area Transit Comm'n. v. Holiday Tours, Inc., 559 F.2d 841. App. at 2 and

---

[4/] Additionally, section 1613.203, 29 C.F.R. Ch. XIV (1987) requires that the Secretary Burnley take personal leadershipin Title VII issues. App. at 24. The action to discharge should have been reviewed by him or the equal employment opportunity officer pursuant to paragraph 8(a)(3) of DOT Procedures for Processing Complaints of Discrimination in Employment Practices, DOT Order 1000.8A (7-10-76) App. at 25.

12, respectively. In sustaining the grant of a stay against permanent injunction, that court rejected a strict probability of success in favor of an,

> "Analysis under which the necessary showing on the merits is governed by the balance of equities as revealed through an examination of the other three factors." Id. at 844.
>
> # # # #
>
> "Generally, such relief is preventative or protective; it seeks to maintain the status quo pending a final determination of the merits of the suit. An order maintaining the status quo is appropriate when serious legal question is presented, when little if any harm will befall other interested persons or the public and when denial of the order would inflict irreparable injury on the movant. There is substantial equity, and need for judicial protection, whether or not movant has shown a mathematical probability of success." Id.

Here the balance of equities must fall decidely in favor of Reshard. Not only did she lose her income, she can not obtain comparable job in the Federal service because of DOT's clearly illegal conduct in not providing the required current job evaluation. This

is a serious matter raised in this lawsuit. The stress of unemployment coupled with the distinct advantage conferred to DOT by reducing Reshard's financial ability to wage this litigation.

Additionally, petitioner made a substantial showing on the merits that she was the victim of retaliation and harassment. She applied for injunctive relief on October 19, 1987, long before she was discharged, and immediately suspended for 14 days on October 21, 1987. The closeness in time and space of the adverse actions supports the retaliation charge. The District Court took no action. DOT was aware of all these issues Reshard raised in her lawsuit. It should not be afforded protection by claiming that it would be harmed by Reshard's reinstatement, back pay, and an unhostile work environment free from harassment and retaliation. The chilling effect of the retaliatory acts on potential complainants and witnesses in my case is

real and substantial. App. at 5. Accordingly, the Court of Appeals erred by granting Respondent's Motion for Summary Affirmance.

CONCLUSIONS

The availability of interim equitable relief in Title VII cases would benefit many persons, without flooding the courts with an increase in lawsuits. Instead, its availability, whether injunctive or declaratory relief, would act as a deterrent to employer abuse (self policing carries an inherent conflict of interest at the agency). More often than not, the employer is motivated to undertake harassment, with the intent of discouraging present and future litigants. The law needs to be clarified in order to correct this usage. An unjust result in this case should be removed.

Respectfully submitted,

Dated May 23, 1988
Washington, D.C.

Connie Reshard, Esq.
700-725 Seventh St., SW
Washington, D.C. 20024
202-488-3832

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 88-5035 SEPTEMBER TERM, 1987
C.A. No. 87-02794

Connie Reshard, Filed Apr.6 1988
Appellant,

V.

Jim Burnley, Secretary,
U.S. Department of Transportation,
Appellee.

BEFORE: Robinson, Silberman and
Williams, Circuit Judges

O R D E R

Upon consideration of appellee's Motion for Summary Affirmance, and the response thereto, it is

ORDERED by the court that the motion be granted for the reasons stated in the accompanying memorandum. The district court's order filed January 29, 1988 is summarily affirmed.

The clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See D.C. Cir. Rule 15.

Per Curiam

# # # #

MEMORANDUM

The district court's decision denying the temporary restraining order, preliminary injunction, and stay motions is reversible only for an abuse of discretion. See National Audubon Soc. v. Hester, 801 F.2d 405, 407 (D.C. Cir. 1986)(per curiam). Although this standard is deferential, the district court's decision may be reversed if it is based on an erroneous view of the law. Id. Here, the district has properly applied the law for consideration of these motions. See Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d

841, 843 (D.C. Cir. 1977). All of the factors were considered carefully, and an evaluation made based on the court's review of two days of testimony. We conclude that the district court has not abused its discretion in denying preliminary relief.

The district court's decision on the motion for declaratory judgement is reversible only for abuse of discretion as well; that the district court has considerable discretion to withhold such relief is clearly established. See National Wildlife Federation v. U.S., 626 F.2d 917, 923 (D.C. Cir. 1980). It appears that Reshard is attempting to obtain the remedy of a declaratory judgment as a final adjudication on the merits. Because the case on the merits is still pending, however, such a determination would be premature. Therefore, such a remedy would be inappropriate at this stage, and the district court was well within its discretion

to deny the motion.

Because the merits of this appeal are so clear as to justify expedited action, we summarily affirm the district court's decision. See Walker v. Washington, 627 F.2d 541, 545 (D.C. Cir.)(per curiam), cert. denied, 449 U.S. 994 (1980).

No. 88-5035 - Reshard v. Burnley

# # # # #

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-5035 SEPTEMBER TERM, 1987

C.A. No. 87-02794

Connie Reshard, FILED Mar 7 1988

Appellant,

V.

Jim Burnley, Secretary
U.S. Department of Transportation,

Appellee.

BEFORE: Robinson, Silberman and
Williams, Circuit Judges

O R D E R

Upon consideration of appellant's Emergency Motion for Stay of Order, and the response thereto, and appellant's Motion to Expedite, it is

ORDERED by the court that the Emergency Motion for Stay of order be denied. See Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985). The arguments advanced

by appellant in this motion will be considered as arguments on the merits along with the other arguments made by both parties regarding the appellee's Motion for Summary Affirmance. It is

FURTHER ORDERED that the Motion to Expedite be denied. Appellant has not demonstrated "strongly compelling" reasons for expedition. See D.C. Cir. Handbook of Practice and Internal Procedures 40 (1987).

Per Curiam

# # # #

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CONNIE RESHARD,

PLAINTIFF,

V. C.A. No. 87-2794

JIM BURNLEY, SECRETARY
U.S. DEPARTMENT OF TRANSPORTATION

DEFENDANT.

MEMORANDUM ORDER

The plaintiff filed this action pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. s2000e et seq.

The case is now before the Court on plaintiff's motion for a preliminary injunction, plaintiff's motion for a stay, plaintiff's motion for temporary restraining order, and plaintiff's motion for declaratory judgment. The Court heard arguments on January 11, 1988 and January 22, 1988. After giving careful consideration to the motions, the oppositions thereto, the record in this case, in this case, and the arguments

of counsel[1], the Court concludes that the plaintiff's motions must be denied.

I

The plaintiff, who is black, contends that she is the victim of discrimination based on her race. She is an Economist, GM-0110-14, in the Trade, Facilitation and Technical Issues Division, Office of International Transportation and Trade, Department of Transportation. It appears from the record that her claim of discrimination is based primarily on an incident, in which a supervisor suggested that she discuss a matter of economics with M. Dennis Marvich, who ~~is a~~ GM-0110-13, Economist, in the same Division. During oral argument on one of motions, the plaintiff stated that she felt it was a "racial slur" to ask her to solicit

[1]The plaintiff, pro se, is an attorney. She represents that she graduated from the Georgetown Law Center and that she is a member of the bar of the State of Pennsylvania.

comments or advice from Mr. Marvich, who is white and has a lower grade. Mr. Marvich is currently a doctoral candidate in Economics at George Washington University, and is currently writing his doctoral thesis. The plaintiff refers to this "racial slur" in a number of her papers.

The plaintiff was suspended from duty and pay for a period of 14 calendar days in October 1987 for, among other things, rude, disrepectful, and insubordinate conduct toward the Director," "refusal to accept and/or acknowledge official correspondence from both [her] first and second level supervisors," failure to attend staff meetings as directed," and absence without leave." Defendant's Motion Exhibit 1 Plaintiff admits to her failure to attend staff meetings, and it appears that she does not deny most of the other allegations. With respect to her refusal to attend staff meetings she advised her supervisor that she would be "pleased to attend staff meetings that

[her supervisor has] seen fit to advise [her] of on several different occasions, provided that [she] receive a written apology from [her supervisor] and that this written apology is read to the staff." Defendant's Motion Exhibit 2, Attachment 1. The apology she seeks is for the incident involving Mr. Marvich.

Plaintiff's allegations concerning her treatment at the agency are set forth in her memorandum addressed to Arnold Levine dated October 5, 1987. Defendant's Motion Exhibit 1, Attachment.

After the action was filed, plaintiff moved from a temporary restraining order complaining that the defendant wrongfully placed her on absent without leave status and that the defendant's staff engaged in intentional and systematic harassment against her. The Court denied the motion without a hearing. See Order filed October 22, 1987.

When the plaintiff continued to refuse to attend staff meetings and allegedly disobeyed other orders from her supervisors, the defendant sent her a "Decision to Remove" notice dated December 21, 1987. A copy was placed on plaintiff's desk, another copy was sent to her at her home, certified mail, and another copy was left with the receptionist at her apartment building. Plaintiff would not accept any of the packages, although it appears that she had physical possession of at least one of them and that she simply refused to open the package.

She seeks the same relief in all of her motions; reinstatement to her job.

II

In order to be entitled to injunctive relief or a stay, the plaintiff must demonstrate that she is likely to prevail on the merits, that she will suffer irreparable harm if injunctive relief is denied, that the other parties will not suffer substantial

injury if injury if injunctive relief is granted, and that the public interest favors the granting of such relief is not adverse to the public interest. Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 182 U.S.App.D.C. 220, 222, 559 F.2d 841, 843 (1977).

Thus far, plaintiff has failed to demonstrate that she is likely to prevail on the merits. This Court has repeatedly asked her to state the nature of the alleged "racial slurs" referred to in her papers. In response, the plaintiff refers the Court to the incident involving Mr. Marvich.

Additionally, the plaintiff, while for the most part conceding that she has disobeyed orders from her supervisors and refused to attend staff meetings, fails to demonstrate that the requests of her supervisors were unreasonable or different from requests made of other employees in her office.

Finally, at this point in time, it appears that the plaintiff has been properly served with the Decision to Remove.

With respect to the likelihood of irreparable harm, it appears that the plaintif has an adequate remedy at law. If she ultimately prevails in this action, the Court can order her reinstated and awarded all back pay and allowances. See Sampson v. Murray, 415 U.S. 61, 94 S.Ct. 937 (1974).

The Court is concerned that, without a change in attitude on the part of the plaintiff, that her return to work could lead to disruption of her office, and in the long run, may prove counterproductive to her cause.

---

[2]The Court does not suggest that the Plaintiff will be unable to prevail in this case or that her case lacks merits. But, notwithstanding that the parties are in litigation, there seems no reason why the plaintiff could not have complied with the reasonable directives of her supervisors during the pendency of this action.

Last, the public interest does not require her return to work.

For all of the above reasons, the Court concludes that the plaintiff's motions for preliminary injunction, temporary restraining order and for a stay must be denied. The plaintiff's motion for declaratory judgment must also be denied.

III

This Court is not without sympathy for the plaintiff's plight. In an effort to bring the parties together, the Court on January 28, 1988, held two on the record telephone conversations, by conference calls with the plaintiff and counsel for the defendants. The Court proposed that it hold the motions in abeyance and make arrangements for them to meet with a Senior District Judge or a Magistrate to determine whether they cannot agree to a resolution of this

case.[1] The parties took several hours to consider the Court's suggestion. Counsel for the defendant advised the Court that the defendant is willing to have the motions held in abeyance and engage in discussions with the plaintiff, while the plaintiff advised the Court that she wanted a ruling on the motions first, but that thereafter, she is willing to engage in a meeting to discuss settlement.

The Court will seek to arrange a settlement conference for the parties.

It is hereby

Ordered that the plaintiff's motions for a sty, a preliminary injunction, and a temporary restraining order and for declaratory judgment are denied.

Jan 29 1988
1:54 P.M.

/s/
John Garrett Penn
U.S. District Judge

[3] Since this case is non-jury, the Court will not discuss settlement with the parties.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CONNIE RESHARD,

PLAINTIFF,

VS. Civil No. 87-2794

JIM BURNLEY,
ACTING SECRETARY, U.S.
DEPT. OF TRANSPORTATION,

FILED
Oct 22 1987

DEFENDANT.

O R D E R

This comes before the Court on the motion for a temporary restraining order filed by plaintiff. In her complaint filed October 15, 1987, she claims that she is the victim of discrimination because of her race, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. s2000e et seq. In her motion, she seeks to compel the defendant to pay the plaintiff for forty-eight hours that she alleges defendant wrongfully placed her on absent without leave status and to prohibit the defendant from continuing alleged in-

tentional and systematic harassment in retaliation of plaintiff's racial discrimination complaint.

After giving careful consideration to the motion, the Court concludes that the motion should be denied.

In order to prevail on the motion the plaintiff must demonstrate that she is likely to prevail on the merits, that she will suffer irreparable harm if injunctive relief is denied, that the other party will not suffer substantial injury if injunctive relief is granted and that the public interest favors or is at least not opposed to the granting of the injunction. See Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 182 U.S.App.D.C. 220, 222, 559 F.2d 841, 843 (1977).

Here, on the face of the complaint and in the motion, the plaintiff has failed to demonstrate that she will suffer irreparable injury. While the Court accepts, for the

purpose of the motion, the reasons why she feels that defendants actions have harmed her, these are matters that can be remedied if she ultimately prevails in this case. Moreover, the harm alleged in her motion for a temporary restraining order is substantially the harm described in her initial complaint, therefore plaintiff does have an adequate remedy at law.

In view of the above, it is hereby

ORDERED that plaintiff's motion for a temporary restraining order is denied.[1]

Oct. 21, 1987
6:48 P.M.

/s/
JOHN GARRETT PENN
UNITED STATES DISTRICT COURT

---

[1]The Court concludes that a hearing is not required. Plaintiff submitted her motion on the papers.

EXCERPTS FROM 42 U.S.C. 2000e

Section 2000e-2 Unlawful employment practices

(a) It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Section 2000e-3 Other unlawful employment pracitices

(a) It shall be an unlawful employment

practices for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

Section 2000e-5 Enforcement provisions

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and

order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission.

Section 2000e-16 Employment by Federal Government

(a) All personnel actions affecting employees or applicants for employment (except) with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5 , in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United

States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

(b) Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission shall have authority to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement . . .

(c) Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department,

agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Equal Employment Opportunity Commission on appeal from a decison or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

# # # #

Section 1613.203 of 29 C.F.R. Ch.XIV (1987)

The head of each agency shall exercise personal leadership in establishing, maintaining, and carrying out a continuing affirmative program designed to promote equal opportunity in every aspect of agency personnel policy and practice in the employment, development, advancement, and treatment of employees. Under the treatment of employees. Under the terms of its program, an agency shall:

(b) Conduct a continuing campaign to eradicate every form of prejudice or discrimination based upon race, color, religion sex, national origin, from the agency's personnel policies and practices and working conditions, including disciplinary action against employees who engage in discriminatory practices.

(g) Review, evaluate, and control managerial and supervisory performance in such a manner as to insure a continuing affirmative application and vigorous enforcement of the policy of equal opportunity, and provide orietation,

training, and advice to managers and supervisor to assure their understanding and implementation of the equal employment opportunity policy and program.

# # # #

Department of Transportation Procedures for Processing Complaints of Discrimination in Employment Practices, DOT Order 1000.8A, (7-10-76) Paragraph 8(a)(3)

No action adverse to an employee shall be initiated and no change shall be made in the duties, assignments or supervision of any employeee after that employee seeks counseling with Equal Employment Opportunity Counselor without prior consultation with the appropriate Equal Employment Opportunity Officer.